telephone company propose capacity on a *non-discriminatory* basis.[72] Will carry type proposals, however, would provide local broadcasters and PEG programmers analog capacity *free of charge*[73] while charging other programmers a fee to utilize the same analog capacity.[74] Will carry schemes, therefore, would discriminate both between like communications services (they will charge users of digital capacity but not analog) and between customers using identical communications services (local broadcasters will not be charged but other programmers wanting analog capacity will).[75] Will carry schemes would thus violate Section 202[76] of the Communications Act, and the Video Dialtone Order.[77] Indeed, Bell Atlantic, the party proposing will carry, has admitted previously in its Application proceedings that providing capacity to local broadcasters and PEG programming free of charge would violate the Commission's video dialtone rules.[78]

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[72] Video Dialtone Order, 7 FCC Rcd at 5797-98, ¶ 30, n.69; Communications Act, 47 U.S.C. § 202.

[73] Bell Atlantic 6966 Application at 5; Bell Atlantic 6912 Amendment at 7-8.

[74] Bell Atlantic's scheme also raises concerns regarding the viability of digital capacity. Requiring programmers who want analog capacity — the only presently utilized technology — to first commit to purchasing 20 digital channels for every one analog channel, strongly indicates that Bell Atlantic perceives a need to force the use of digital technology. Bell Atlantic 6966 Application at 5; Bell Atlantic 6912 Amendment at 8.

[75] See ABC v. FCC, 663 F.2d 133 (D.C. Cir. 1980).

[76] 47 U.S.C. § 202(a).

[77] 7 FCC Rcd. at 5797-98, ¶ 30, n.69.

[78] Application of The Chesapeake and Potomac Tel. Co. of Maryland and Virginia, W-P-C-6912, Opposition to Petitions to Deny at 4, n.9 (filed Feb. 28, 1994) ("For example, the County argues that the Bell Atlantic Companies should provide free or reduced rate access for public, educational or governmental ("PEG") use. . . . But this directly conflicts with the Commission's video dialtone rules, which require non-discriminatory access for all

2. Commission Mandated Preferential Treatment Schemes Would Violate The Communications Act And The First Amendment

The second manner in which preferential treatment might be implemented, by Commission mandate (or "must carry"), would violate the Communications Act and the First Amendment. Initially, even the Commission has previously recognized that mandated preferential treatment for certain classes of programmers would violate Title II of the Communications Act.[79] Several parties, however, continue to insist that they be granted special treatment, arguing that the Commission has previously recognized exceptions to general common carrier nondiscrimination requirements.[80] Those exceptions, however, were based upon a "*compelling showing of need and strong public policy concerns.*"[81] Such a showing cannot be established for video dialtone.

In Turner Broadcasting System, Inc. v. FCC,[82] the Supreme Court remanded a challenge to the cable must carry provisions, expressing significant concern that there was no factual support for Congress' interest in favoring local broadcasters. Yet, the interplay of cable and broadcasting has been chronicled for over 20 years. If after such experience, the Court still expressed skepticism regarding the evidence showing a need for cable must carry rules, then it is impossible for the Commission to determine at this time that local

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programmers"); Bell Atlantic W-P-C-6966 Application at 4, n.10.

[79] Video Dialtone Order, 7 FCC Rcd at 5805, ¶ 44; Video Dialtone Order Recon, ¶ 254.

[80] Video Dialtone Order Recon, ¶ 255.

[81] Id. ¶ 255 (emphasis added).

[82] 114 S. Ct. 2445, 2471-72 (1994).

broadcasters have shown "a compelling showing of need and strong public policy concerns" supporting preferential treatment in video dialtone. There is no factual evidence indicating the impact of video dialtone on local broadcasters or any other programmer. Indeed, the basis for preferential treatment proposals are directly contrary to "channel sharing" proposals, which assume that local broadcast networks will be so popular that there is a risk of duplicative carriage of them by multiple programmers. Further, any claims that local broadcasters or non-profit programmers cannot afford carriage on video dialtone systems absent special rates or subsidies are being made in the absence of any announced commercial video dialtone rates — no LEC has filed a tariff for commercial video dialtone service indicating what carriage will cost. Accordingly, the Commission cannot determine that an exception to the fundamental nondiscrimination provisions of the Communications Act is needed. Because there is no factual basis to support mandated preferential treatment, video dialtone "must carry" would also violate the First Amendment rights of the LECs who are forced to transmit the programming of certain speakers.[83]

B. Public Policy Also Mandates That Preferential Treatment Schemes Not Be Imposed Or Allowed

Preferential treatment schemes for video dialtone would also violate public policy and thwart the achievement of the Commission's public policy goals. As the Commission has recognized, "[a] system of discounts or free access for certain video programmers could also introduce economic distortions that would restrict demand for video

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[83] Id.

dialtone service."[84] Further, "[u]nlike other video distribution regulatory schemes, the bedrock common carrier nature of video dialtone . . . will require unfettered access for all program providers, regardless of their nature and, in this way, will directly promote the goals access rules have historically been designed to meet."[85] Nothing has changed to compel the abandonment of these findings.

As previously discussed, fundamental to the Commission's determination that video dialtone can advance its public interest goals is the requirement that video dialtone be offered on a nondiscriminatory, common carrier basis. Yet, preferential treatment schemes would undermine that fundamental requirement. Discrimination by LECs in the choice of which programmers will be granted "will carry" status is unacceptable, as it creates a substantial opportunity for, and likelihood of, favoritism toward programmers in which a LEC has an interest.[86] Discrimination by the Commission is no less unacceptable. The result of discriminatory treatment by anyone, the LEC or the Commission, will still be the same: distortions in the market as favored programmers are granted commercially favorable channel positions; increased cost for those programmers who must subsidize favored programmers; and the subsequent increase in cost to consumers who may not want to pay for the favored channels, but to whom the cost is passed on by other programmers to which the consumers subscribe.

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[84] Video Dialtone Order Recon, ¶ 254.

[85] Id. (quoting Video Dialtone Order, 7 FCC Rcd at 5805, ¶ 44).

[86] Supra p. 14.

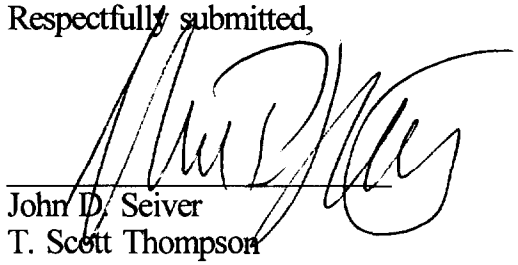
Further, there is the issue of what programmers are to be chosen. Local broadcast stations that show syndicated re-runs do not serve the public interest more than programmers, such as C-Span and CNN, that are traditionally carried on cable systems, yet under all the proposed schemes, those would be the channels that benefit, to the detriment of C-Span and CNN. Indeed, the public interest would not be served by allowing the NBC affiliate in New York City, which is owned by General Electric, to gain free access to NYNEX's video dialtone system, when educational programmers, like the Discovery Channel, must pay full price and support the GE owned NBC affiliate. Ultimately, any attempt to begin making such determinations regarding what programmers should be favored will inevitably degenerate into unsupported, subjective value judgments by regulators, as opposed to allowing the marketplace to work freely. Such a situation will not advance the Commission's public interest goals.

CONCLUSION

The Commission should adopt an Order stating that analog channel sharing and similar proposals are contrary to the Communications Act, the Cable Act, the Video Dialtone Order, and the public interest, and forbidding video dialtone providers from engaging in such schemes. Further, the Commission should state in its Order that preferential treatment of certain programmers, whether mandated or voluntary, would similarly violate the Communications Act, the Cable Act, the Video Dialtone Order, the First Amendment, and the public interest. The Commission should, therefore, refuse to adopt such mandated preferential

treatment proposals, and further, it should forbid video dialtone providers from implementing such proposals voluntarily.

Respectfully submitted,



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December 16, 1994

CERTIFICATE OF SERVICE

I, Courtney Smith do hereby certify that on this 16th day of December 1994, I have caused a copy of the foregoing to be served via first-class United States Mail, postage pre-paid, upon the persons listed on the attached service list.

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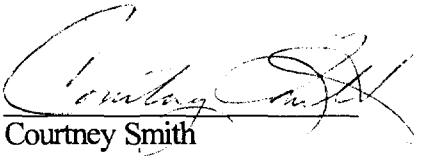

Courtney Smith

* hand delivered